

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HEARD BEFORE THE HONORABLE WILLIAM E. SMITH

DISTRICT JUDGE

(Sentencing)

REDACTED TRANSCRIPT

APPEARANCES:

FOR THE GOVERNMENT: ANDREW REICH, AUSA
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT: GEORGE J. WEST, ESQ.
One Turks Head Place
Suite 312
Providence, RI 02903

Court Reporter: Anne M. Clayton, RPR
One Exchange Terrace
Providence, RI 02903

Proceeding reported and produced by computer-aided
stenography

1 2 DECEMBER 2011 -- 9:00 A.M.

2 THE COURT: Good morning. This is the matter of
3 the United States versus David Whitaker. We're here
4 for sentencing this morning.

5 Let's have counsel identify themselves for the
6 record, please.

7 MR. REICH: Andrew Reich on behalf of the United
8 States of America.

9 MR. WEST: George West for David Whitaker.

10 THE COURT: Mr. West, can you confirm for me
11 that you've had the opportunity to review the
12 Presentence Investigation Report with your client and
13 you've been able to answer all of his questions?

14 MR. WEST: I have, your Honor.

15 THE COURT: And there are no objections to the
16 presentence report; is that correct?

17 MR. WEST: That is correct.

18 THE COURT: No objections from the Government
19 either, correct?

20 MR. REICH: Yes, your Honor.

21 THE COURT: All right. Then I'll start by
22 setting forth on the record the advisory guideline
23 calculations as they are set forth in the presentence
24 report, and then we'll move to discussion of the
25 departure motion.

1 So we begin with paragraph 19, Group 1, which
2 involves Counts I and II. The base offense level is
3 level 7. There is a 20-point enhancement because the
4 loss in this case was greater than \$7,000,000 but less
5 than \$20,000,000. There's an additional four-point
6 upward adjustment because the offense involved in
7 excess of 50 victims but less than 250 victims.
8 There's a two-point upward adjustment because the
9 Defendant was an organizer, leader or manager or
10 supervisor, and that yields an adjusted offense level
11 in this group of 33.

12 On Count III, the base offense level, which is
13 detailed in paragraph 27, is a level 22. There's an
14 additional point added because the Defendant was
15 convicted under 18 U.S.C. 1957. That yields an
16 adjusted offense level of 23. And paragraph 34 details
17 the offense level for Group 1, which includes the
18 counts that I just relayed, and the combined offense
19 level, therefore, is 33.

20 Now, in Group 2, which is Count IV, the base
21 offense level is an 8. There's an eight-point
22 adjustment because the bribe or improper benefit
23 conferred exceeded \$5,000; and as set forth in the
24 presentence report, the plea agreement stipulated that
25 the loss relating to Count IV was more than 70,000 but

1 less than 120,000 and in accordance with Section
2 2B1.1(e), the offense level is increased by eight
3 levels. That yields an adjusted offense level of 16.
4 So under the grouping rules, the combined offense level
5 in this case as detailed in paragraph 42 of the
6 presentence report reverts to the Group 1 level, which
7 is 33.

8 Now, there's a three-point downward adjustment
9 for acceptance of responsibility, so the final total
10 offense level is a level 30.

11 The Defendant's criminal history is summarized
12 in paragraph 50. That paragraph indicates he has eight
13 criminal history points. Two points are added because
14 he committed this offense while he was on probation in
15 regard to a previous matter. That gives him ten
16 criminal history points and places him in criminal
17 history category of 5.

18 So at level 30, criminal history category of 5,
19 the Defendant's advisory guideline range is 151 months
20 to 188 months of incarceration.

21 Now, we have a downward departure motion by the
22 Government, so I'll hear you, Mr. Reich, on that.

23 MR. REICH: Your Honor, there are a number of
24 factors that we would like to point out to the Court
25 that we consider to be relevant in imposing the

1 appropriate sentence in this case. Some of those
2 factors were submitted to the Court in our motion that
3 we filed under seal pursuant to guideline Section
4 5K1.1, and we have nothing to say beyond what we've
5 already set forth on the record in that motion unless
6 there's something specific the Court would like to hear
7 from the Government on that particular point.

8 THE COURT: No. Why don't you and Mr. West,
9 since you're dealing with matters filed under seal, why
10 don't you both come up for a moment.

11 (Side-bar conference.)

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]











1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 (End of side-bar conference.)

22 THE COURT: Mr. Reich, I'll hear you on the

23 Government's motion to depart.

24 MR. REICH: Your Honor, as I stated previously,

25 there are a number of factors which the Government

1 believes the Court should take into consideration in
2 imposing the appropriate sentence in this case, and
3 included among those are the factors that we pointed
4 out in our motion for a downward departure under United
5 States guideline Section 5K1.1. And in that motion, we
6 described the nature of the Defendant's cooperation
7 with the Government and, again, I'll address some other
8 issues regarding sentencing later, but specifically
9 concerning his cooperation, I think it would be
10 accurate to describe his cooperation in this case and
11 the impact of his cooperation as being rather
12 extraordinary in the sense that after Mr. Whitaker was
13 sent out of Mexico and returned to the United States,
14 he was incarcerated here in Rhode Island. At that
15 point, we started to speak to him, and he told us about
16 a relationship that he had with Google and the fact
17 that he had been advertising the sale of unlawful
18 pharmaceutical products through Google's AdWords
19 program.

20 Based on that information, we initiated a
21 criminal investigation into what I would describe as
22 rogue pharmaceutical companies or rogue pharmacies that
23 were advertising the sale of controlled and
24 non-controlled prescription drugs through the Internet
25 using Google's AdWords program as a form of

1 advertising. And based on our investigation, we came
2 to learn that when these companies advertise through
3 the Google AdWords program, this was an extremely
4 effective way in which they were able to reach United
5 States customers, and they were able to increase their
6 sales tremendously by advertising through that program.

7 So Mr. Whitaker provided cooperation to us by
8 telling us how he established a relationship with
9 certain customer service representatives at Google, how
10 he, while he was in Mexico, actually used the Google
11 AdWords program to advertise the sale of unlawful
12 pharmaceutical products to consumers in the United
13 States. And based on that information, we actually
14 initiated an undercover operation, which lasted
15 approximately four months. It was during the early
16 part of 2009. Mr. Whitaker was very instrumental in
17 assisting us in setting up a number of undercover
18 websites which purported to sell unlawful
19 pharmaceutical products to consumers here in the United
20 States, representing that many of these products came
21 from drug distributors outside the United States.

22 Mr. Whitaker was instrumental in setting up
23 those websites and also providing information to us on
24 how we were able to contact people at Google and
25 contact various customer service representatives at

1 Google and engage in various types of contacts with
2 them, which led us to understand that they were
3 assisting in allowing these types of advertisements to
4 occur and appear in Google's AdWords advertising
5 program.

6 Our undercover operation lasted about four
7 months. During that period of time, Mr. Whitaker was
8 taken out of the prison facility on almost a daily
9 basis for the purpose of assisting us. His assistance
10 was very truthful. It was very complete. And he spent
11 lengthy hours with us in setting up these websites and
12 providing information to us.

13 Ultimately, the investigation went overt; and as
14 a result of the undercover phase of the investigation,
15 we learned a lot of other things about how the Google
16 AdWords program operated and how what I've described as
17 rogue pharmacies were able to advertise through the
18 Google's AdWords program. And the investigation
19 actually started with the undercover operation, started
20 with Mr. Whitaker's information, but then led us to a
21 greater understanding about some other things with
22 respect to Google and its AdWords program and the rogue
23 pharmacy advertising that was occurring.

24 Eventually, we entered into some discussions
25 with Google about that program. We expressed and they

1 became aware of the fact that we were conducting a
2 criminal investigation, and those discussions
3 ultimately ended. In August of this year, we entered
4 into a non-prosecution agreement with Google; and under
5 the terms of that agreement, which have been made
6 public already, Google agreed to pay \$500 million, to
7 forfeit \$500 million and that amount represented both
8 the revenue which Google itself received from the
9 unlawful advertising by these rogue pharmacies, plus
10 the revenue that was received by these rogue pharmacies
11 themselves.

12 But perhaps more importantly, as part of that
13 resolution of the case and leading to that resolution,
14 Google agreed to no longer permit rogue pharmacy
15 advertising to consumers here in the United States.
16 Specifically, they had allowed Canadian pharmacies,
17 many of which actually obtained their pharmaceutical
18 products from other countries, including countries in
19 Asia, so they changed their policy as a result of this
20 investigation and no longer permitted these Canadian
21 rogue pharmacies to target their advertisements to
22 consumers here in the United States.

23 In addition, as part of that agreement, they
24 agreed to institute a number of compliance measures and
25 to engage in regular reporting to us so that we can

1 insure and make sure that they're complying with the
2 steps that they said they would take to make sure rogue
3 pharmacies no longer advertised through the Google
4 AdWords program. And based on what's happened so far,
5 they have taken those measures and they have, in fact,
6 made some reports to us when they've discovered rogue
7 pharmacies that somehow have gotten into the system,
8 they reported those things to us.

9 So the impact of the investigation has been
10 tremendous because there are literally millions of U.S.
11 consumers that would have clicked on these various
12 AdWords advertisements and would have obtained these
13 pharmaceutical products, many of which are prescription
14 drugs which people were obtaining without prescription;
15 many of which were drugs that were obtained from
16 foreign countries and consumers in the United States
17 would be getting those drugs without those drugs having
18 been first approved by the FDA to ensure their safety.

19 So as a result of this investigation, there are
20 literally millions of U.S. consumers who have been
21 saved from the dangers that they would have been
22 exposed to had these rogue pharmacies been permitted to
23 advertise on the Google AdWords program.

24 So in looking at Mr. Whitaker's cooperation, and
25 we can say that but for his cooperation this

1 investigation would not have taken off to start with
2 and then it led to, you know, a very broad
3 understanding of what Google was doing with respect to
4 the pharmacy advertisement. But we've considered the
5 significance, the usefulness of his cooperation, which
6 as I've stated has been tremendous. We've considered
7 the truthfulness and completeness of his cooperation,
8 which also has been both very truthful and we consider
9 to be very truthful and complete. The nature and
10 extent of his cooperation, which I've already set forth
11 to the Court. We've also considered, because this is
12 one of the factors the Court is to consider, whether
13 Mr. Whitaker was exposed to any injury or danger of any
14 injury from his cooperation. On that particular point,
15 we would say that the nature of his cooperation did not
16 expose him to any injury or danger of injury.

17 And finally, the timeliness of his cooperation.
18 And we could say that with respect to timeliness, it
19 was very shortly after Mr. Whitaker was returned to
20 Rhode Island after he had been arrested upon his return
21 from Mexico. He was brought back to Rhode Island, and
22 very shortly thereafter he contacted my office and said
23 that he wanted to provide some information, and myself
24 along with agents of the Food and Drug Administration
25 went and sat with him and that's how the investigation

1 was initiated. So he did begin to cooperate very soon
2 after his returning to Rhode Island.

3 So based on all of these considerations, we
4 believe that an appropriate departure in this case
5 would be a nine-level departure from the level 30 that
6 he is at right now, which would bring him down to a
7 level 21, and that is what we are recommending in this
8 particular case based on his cooperation, that he
9 receive a nine-level departure.

10 THE COURT: Thank you, Mr. Reich.

11 Mr. West, do you want to comment on the
12 departure motion?

13 MR. WEST: Yes, your Honor.

14 Your Honor, as the Court knows from the papers
15 that we filed in this matter, the defense is entering
16 into a joint recommendation in support of the 5K
17 departure motion and the nine-level reduction to level
18 21 with the recommended sentence that I'm sure the
19 Court will get into subsequently.

20 I would say that based on my own understanding
21 of the steps that were taken with the Google
22 investigation that Mr. Reich has accurately detailed
23 for the Court my understanding of the extent of
24 Mr. Whitaker's cooperation in this matter.

25 I, from my own part, have been representing him

1 since I believe 2008, and he has been housed at the
2 Wyatt Detention Facility for the last 44 months, I
3 believe, as of now. It's a difficult incarceration,
4 not a BOP facility. He diligently performed this work,
5 your Honor. I believe that in the undercover phase
6 over 1100 hours of work that he was counting went into
7 his level of cooperation in support of the Government's
8 effort and further work thereafter but certainly in
9 that very active phase. It was complicated work. It
10 wasn't work that anyone could have done. It was work
11 that required him to apply his mind for extended hours
12 each and every day that he was doing it and in a
13 creative capacity. It had field aspects to it where he
14 would be in contact with the other side of the
15 equation, if you will.

16 So Mr. Whitaker's work in this regard was
17 pervasive. I can't add to the Government's
18 quantification of it. I think it says it all that this
19 could not have happened but for what he did to make
20 this undercover investigation work out.

21 Your Honor, the 5K reduction is a significant
22 reduction, but I hope the Court will bear in mind in
23 contemplating it that it does not result in a sentence
24 wherein Mr. Whitaker would be free of incarceration.
25 So he still is going to have to serve time under the

1 Government's recommended 5K motion. I hope the Court
2 will bear that in mind as well. Thank you.

3 THE COURT: Thank you, Mr. West. All right.

4 I'm going to accept the Government's recommended
5 downward departure of nine levels. It is a very
6 significant departure, extraordinary departure in many
7 ways; but having observed from a distance this matter
8 for the last three plus years, there's no doubt that
9 the Defendant has displayed a level of assistance to
10 the Government that is significant, and maybe
11 extraordinary, resulting in the \$500 million
12 non-prosecution agreement. I don't think there's any
13 question that everything Mr. Reich described is an
14 accurate depiction of the level of that cooperation and
15 the significant result needs to be accounted for in
16 determining the level of departure.

17 So a nine-level departure would place the
18 Defendant in a level 21. And at criminal history
19 category of 5, his guideline range would be adjusted to
20 70 to 87 months of incarceration.

21 So with that, then, I'll turn it back over to
22 you, Mr. Reich, to set forth your recommendation with
23 respect to the appropriate sentence.

24 MR. REICH: Your Honor, as I stated before,
25 there are a number of factors that we have taken into

1 consideration in trying to determine what would be the
2 appropriate recommendation here. And amongst them
3 is -- are the factors we just set forth with respect to
4 Mr. Whitaker's cooperation.

5 In addition to that, in considering the
6 appropriate recommendation here, we have considered all
7 of the factors that are set forth in Section 3553(a),
8 which sets forth some of the circumstances that the
9 Court is to consider in fashioning an appropriate
10 sentence. And the first and what we believe is the
11 most important consideration are the nature and
12 circumstances of this particular offense.

13 We have great concern in this case and have
14 since our investigation of the underlying offense
15 concerning the activities of the Defendant's company,
16 Mixitforme. We've had very great concern about the
17 impact this case has had on the various victims who
18 were defrauded in the Mixitforme fraud that this
19 Defendant was responsible for. And as the Court knows
20 from the presentence investigation report, the
21 Defendant engaged in a business where he failed to
22 deliver products to many customers who had paid
23 millions of dollars to his company for an electronic
24 product that was never delivered to them. There were
25 approximately 83 business customers that were defrauded

1 in this case and that they have reported over \$7.5
2 million in losses. And they engaged in numerous
3 transactions with the Defendant. False statements were
4 made to them about Mixitforme's relationship with
5 certain distributors. They were given false reasons
6 for why deliveries were not made. And during this
7 entire period of time that these business victims were
8 being defrauded, the Defendant himself was taking this
9 money and using that money for his own personal benefit
10 in order to have some very extravagant personal
11 expenses for himself.

12 These various business customers have been very
13 severely impacted, both financially, emotionally, and
14 we certainly have put great weight on the impact to
15 those victims in trying to come up with an appropriate
16 sentence.

17 In addition to those particular victims, another
18 victim in this case was a company, Nova. Nova was a
19 company that acted as the credit card processor for
20 Mixitforme. They decided to take on that role based on
21 false information that was provided to them by
22 Mr. Whitaker and other people that were involved in his
23 business enterprise. And at the end of the day, they
24 were defrauded of approximately \$2.2 million.

25 So as I said, the impact that the underlying

1 case involving Mixitforme and Mr. Whitaker's activities
2 is of great concern to us, and we certainly put great
3 weight in the impact that this case has had on those
4 victims.

5 In addition to coming up with the appropriate
6 recommendation, we have considered both the Defendant's
7 criminal history and his personal characteristics. We
8 believe that Mr. Whitaker must be punished for the
9 conduct that he engaged in. We also think that a
10 sentence must be fashioned which both deters
11 Mr. Whitaker from engaging in similar type of conduct
12 in the future and also deter other people who may be
13 out there thinking of defrauding people. We need to
14 send a strong message to those individuals also.

15 We think that the restitution, which we are
16 going to be recommending in this case, is extremely
17 important, and we are going to be asking that the Court
18 impose full restitution to all of the victims in this
19 case. And it is certainly our hope that Mr. Whitaker,
20 once he is released from prison, will be able to start
21 in some fashion making restitution to those various
22 victims.

23 So based on all of these considerations, we are
24 recommending a sentence of 70 months incarceration,
25 we're recommending supervised release of five years,

1 and we're recommending that the Court order full
2 restitution in this case to the 83 customers who are
3 listed in the Presentence Investigation Report. We
4 would ask that the restitution be according to the
5 numbers that are set forth in that report, and those
6 victims have reported losses in the amount of
7 \$7,848,662. So we would ask for full restitution in
8 that amount and then we would ask that the Court order
9 full restitution to Nova, which has reported losses in
10 the amount of \$2,216,737. And we would ask that that
11 portion of the restitution be ordered joint and several
12 with Cory Johnson, who is the other individual who was
13 engaged in the activities of the Mixitforme company.

14 We're not asking for any fine in this case
15 because it does not appear that Mr. Whitaker has the
16 ability to pay a fine; and we also, if the Court
17 follows our recommendation, we also know there will be
18 a very large sum of money that Mr. Whitaker is going to
19 have to pay to these various victims.

20 And finally, we would ask for a special
21 assessment in the amount of \$400. That is our
22 recommendation, your Honor.

23 THE COURT: Thank you, Mr. Reich.

24 Mr. West?

25 MR. WEST: Thank you, your Honor.

1 Your Honor, we believe that -- first of all, let
2 me reiterate that the defense is engaging in a joint
3 recommendation for a sentence of 70 months in this
4 matter, based largely on some of the considerations
5 that Mr. Reich has already detailed.

6 Your Honor, in doing so, I recognize that we're
7 not arguing for a time-served sentence in this case.
8 We're arguing for a sentence where Mr. Whitaker will
9 have to continue to serve time in prison. I think that
10 the sentence as I've written in my sentencing
11 memorandum, which has been filed in this Court under
12 seal, the sentence strikes a balance in this case
13 between the need -- the 3553 elements. The first is, I
14 would say, incapacitation. One of the principles of
15 Federal sentencing is to take a defendant who has
16 committed certain acts, take him out of society for a
17 period of time under the thesis that he can't commit
18 those acts while he is incarcerated.

19 The Defendant in this instance has served 44
20 months in the Donald W. Wyatt Detention Facility. And
21 this Court has sat in this district for a long time and
22 knows that that is a highly restrictive life that he
23 spent for almost four years in Wyatt. And because of
24 the physical section that he's in in Wyatt, he rarely
25 even saw the actual sun during that time period. A

1 highly restrictive life. And I think the Court ought
2 to take that factor into account when you gauge the
3 extent of incapacitation or detention that's required,
4 the punishment that's required.

5 Typical defendants would move along in the
6 system much more rapidly. But for the work that he was
7 doing here, so would have he. So two edges of the
8 sword, I recognize, but nevertheless a highly
9 restrictive form of detention, and we think that the
10 continued detention up to the 70-month period will send
11 a message to other people who would be inclined toward
12 this type of behavior to the extent that people who do
13 this type of behavior receive messages, it seems to me
14 that Mr. Whitaker's cooperation, as has been detailed,
15 use words like "unprecedented." I think we use that
16 word all the time nowadays to the point where we don't
17 even give it a real meaning. But the reality is that
18 the result here is one of the largest in the history of
19 the republic in terms of civil recoveries by the
20 Government for this type of thing. And that can't be
21 understated.

22 And the other reality is, I think I saw in some
23 of the paperwork that over a billion dollars of sales,
24 not just in the Google environment, but the other
25 related Internet providers have been perhaps terminated

1 because of this investigation and it results in these
2 kinds of pharmaceuticals, which did not have the
3 regulation that the Government requires to make sure
4 that they're safe.

5 So these things are without kindred examples,
6 they're one-off, and that's a product that grew out of
7 this case and it's an astounding result. But the
8 reason I focus on that for the moment is that even so,
9 even so he did this, he still has to stay in jail and
10 he still has to serve 26 additional months that would
11 be required under this sentence.

12 So I think you're sending a loud and clear
13 message by this sentence that even if the cooperation
14 is done here, he's still going to have to pay a price.
15 And I would hesitate to say who could achieve a
16 cooperation result that this Defendant has achieved and
17 nevertheless does a sentence that requires he stay in
18 jail. So I think that the issue of sending a message
19 is loud and clear and done in this case. So
20 incapacitation, sending a message to other would-be
21 perpetrators has been accomplished.

22 I have said to the Court in my papers that
23 Mr. Whitaker has medical concerns. I've outlined those
24 in detail. I've attached to the sealed memorandum
25 reports from Dr. Ablow, report from Dr. Rich, report

1 from Dr. Parsons, and some historical reports that are
2 spoken of in the sentencing memorandum detailing the
3 medical situation with respect to Mr. Whitaker, which I
4 hope the Court will take into account under that
5 section of the 3553 criteria. I won't go into detail
6 now because of the personal nature and the Court is
7 well apprised of it, I believe.

8 The second point I'd like to make in that regard
9 is I've also put in there a recommendation that we
10 would seek from the Court that Mr. Whitaker in any
11 sentencing that the Court does impose have a judicial
12 recommendation that he be placed in a medical facility
13 within the BOP, and we specifically are requesting the
14 Fort Devens medical facility be designated. And the
15 reasons for that are several, one of which is that he
16 has a plan to try to come out of incarceration with the
17 view toward seeking employment, obtaining employment
18 and beginning on the pathway to restitution, and that
19 plan focuses in the Boston area. So it would be
20 facilitating moving -- facilitate a great many things,
21 one of which would be a medical provider will be
22 identified and connected to Mr. Whitaker in the same
23 geographic zone. There could be overlap in terms of
24 getting him prepared to be released. And it's
25 critically important, it seems to me, that that be done

1 in this case, and I've outlined those in the filings
2 that we've made.

3 Secondly, it seems to me, your Honor, that this
4 Court could enter an order that would accomplish the
5 maximum effect in a fraud case, and I've detailed my
6 legal argument with respect to this particular
7 guideline section. And it's perhaps not especially
8 helpful for me to get into a broad guideline legal
9 argument at this stage, but I would just point out that
10 in sentencing for fraud cases, as this Court is well
11 aware because this Court has handled several high-level
12 fraud cases, one of the most salient criteria that the
13 Court likes to achieve is restitution for the victims.

14 So punishment is a big aspect of it.
15 Restitution is a big aspect of it. And I think in this
16 case we've put in before the Court a detailed plan
17 where Mr. Whitaker could employ some of his skills to
18 gainful employment and begin the task of trying to
19 recoup funds that could be paid to the various victims
20 of the Mixitforme fraud. And I think that he is
21 uniquely capable in this regard, given what he's proven
22 that he can do to get to work and to start recouping
23 some funds that could be paid out in restitution.

24 And I know that this Court's primary interest
25 with respect to this aspect of the case is for the

1 victims. The victims here are real. The losses are
2 significant. And Mr. Whitaker is remorseful and he's
3 desirous of employing his talents to do exactly that,
4 Judge, to work to achieve restitution. I think you
5 could effectuate, by striking this balance that we're
6 asking you to strike, the opportunity for him to do
7 that effectively and to use the talents that he's
8 proven that he has without doubt to achieve that
9 result.

10 So I've also requested certain matters that are
11 in the presentence report. I'll leave those to the
12 Court's consideration. I can answer any questions the
13 Court may have at this point.

14 THE COURT: No. I think you said it all, either
15 in your papers or this morning. So thank you.

16 MR. WEST: Thank you, your Honor.

17 THE COURT: Mr. Whitaker, do you wish to say
18 anything before I impose sentence?

19 THE DEFENDANT: Your Honor, the work that I did
20 with the FDA task force is what I'm most proud of in my
21 life. The results of what we did, it had a great
22 effect. But beyond that, on a more personal note,
23 Jason Simonian and the agents that I worked with, they
24 taught me a lot about how to be a better person and how
25 to use my talents in a positive way. They taught me

1 the true value of honesty and integrity. From what I
2 saw, they practice these qualities every day.

3 In the beginning of my case, I felt like I was
4 the victim. As I continued to work with these guys, my
5 perspective changed. I now understand who the real
6 victims are, and how I caused them to suffer. They say
7 that actions, that they speak louder than words. And
8 I'm sure that many people have stood here and said,
9 "I'm sorry." But I have a greater responsibility than
10 just saying those words. I've hurt a lot of people,
11 and I've made a mess of my life.

12 My apology, your Honor, would be to change and
13 in every way that I can to give back for what I've
14 taken. Thank you, your Honor.

15 THE COURT: Thank you, Mr. Whitaker. You may
16 remain standing.

17 Well, this is an extraordinary case and for so
18 many reasons, and all of them have been eloquently
19 discussed by counsel this morning and by you. So I'm
20 going to keep my comments rather brief, I hope. But
21 the matter, this matter has been in this Court for I
22 think three-and-a-half years or at least from the date
23 of your plea, I believe, and I've observed from a
24 distance the work you've been doing, not really knowing
25 until the end what you were really doing in terms of

1 your cooperation and that's been spoken of in detail.

2 The bottom line from my point of view is that I
3 think the recommended sentence of the Government and
4 your counsel is an appropriate recommendation, and I'm
5 going to accept it and I'm not going to -- while I have
6 the ultimate decision-making power with respect to
7 determining what the sentence should be, I, in this
8 case, am putting a lot of weight on the recommendations
9 of the Government and your counsel and the fact that
10 it's a joint recommendation because of the nature of
11 everything that's gone on here, and I am very reluctant
12 to modify that recommendation. But I do want to make
13 clear that my decision is an independent decision
14 because I think it is exactly the right balance and
15 what needs to be achieved here is a balance because
16 what we have is a crime that was a significant,
17 sophisticated white-collar crime that involved an
18 extraordinary amount of loss to a great number of
19 people and businesses.

20 So on one hand, the crime is very serious and
21 needs to be met with a serious punishment; and on the
22 other hand, the cooperation and the work you've done
23 over the course of the last several years is also truly
24 significant and extraordinary and needs to be
25 recognized. And so in this case, there truly is a need

1 for a balanced sentence, and I think that the
2 recommendation of 70 months of incarceration, a total
3 of 70 months is exactly the right balance. So I give a
4 lot of credit to the United States Attorney's Office
5 and to Mr. West in coming up with a kind of
6 recommendation that does such a good job of balancing
7 all of the factors that need to be considered in
8 determining the appropriate sentence.

9 Now, one thing that's sometimes a concern in
10 white collar cases such as this is that individuals can
11 use the same talents that they used in committing the
12 crime to sort of buy their way out of serving the
13 sentence for that crime. Once again, I think this
14 sentence does not allow that to happen. I think it
15 does account for the seriousness of the crime, and, as
16 has been pointed out by counsel, it does send the
17 appropriate message. And there's always a question of
18 whether people who are potential wrong-doers, do they
19 get the message or are we all just deceiving ourselves
20 in that regard in terms of sending a message of
21 deterrence.

22 I think particularly in this type of crime
23 people do notice that if you commit this kind of
24 sophisticated white-collar fraud, you are going to
25 serve time in prison and it's not, as Mr. West has

1 pointed out, it's not easy time. Doing 44 months at
2 Wyatt is, I think, as Mr. West correctly has pointed
3 out, is harder than doing 44 months in another BOP
4 facility, particularly one, perhaps, like Fort Devens.

5 So I think it achieves the goals of sentencing
6 in terms of accounting for the nature and circumstances
7 of the offense, and it accounts for deterrence and
8 protection of the public, and I also think that it's an
9 appropriate sentence with respect to your own
10 individual circumstances, and those have been discussed
11 somewhat here in Court and also detailed in the papers.

12 Mr. West has made a point about my concern in
13 other cases and also in this case for restitution for
14 the victims. I do put a very high priority on
15 restitution. In most cases, restitution, particularly
16 where the loss is as great as it is in this case, is
17 hard to achieve. But I think there's a decent chance
18 that with your talents and abilities and your plan, and
19 hopefully giving you credit for the things you just
20 said with your new vision on life, that there's a
21 decent chance that some of these victims will actually
22 see some restitution. And I am, of course, going to
23 make that part of the sentence.

24 In terms of recommendations of counsel with
25 respect to the location or designation of a facility, I

1 am going to accept the recommendation of counsel that
2 you be incarcerated in a BOP medical facility. I think
3 that's appropriate, and I am also going to recommend
4 that it be at Fort Devens; and I've indicated to
5 counsel that I will work with them on a more detailed
6 statement to the Bureau of Prisons with respect to my
7 recommendation in that regard. And I'll be working
8 with counsel to do that after sentencing is completed
9 today.

10 But I think it is an appropriate -- although you
11 recognize that that decision is ultimately in the hands
12 of BOP, not my determination, but I do think it's an
13 appropriate recommendation to make for several reasons,
14 including the one Mr. West just talked about with
15 respect to attempting to put you in a position where
16 you can provide restitution to the victims as early as
17 possible.

18 So in the matter of the United States versus
19 David Whitaker, the Defendant is remanded to the
20 custody of the Federal Bureau of Prisons for a term of
21 70 months on Counts I, III and IV, and 60 months on
22 Count II to run concurrent, meaning at the same time,
23 as the sentence on Counts I, III and IV. So the total
24 term of incarceration is as I've indicated and as
25 recommended by counsel 70 months.

1 In terms of supervised release, the Defendant
2 shall serve a term of supervised release following his
3 incarceration of three years on Counts I, II and III
4 and five years on Count V. As a special condition of
5 his supervised release, in addition to the standard
6 conditions, I'm going to require that you participate
7 in a program for mental health treatment as directed
8 and approved by the Office of Probation and that you
9 shall contribute to the cost of that treatment based on
10 your ability to pay as determined by the Probation
11 Office.

12 I am going to order restitution in the following
13 amounts: \$7,848,662.82 to the victims listed in the
14 probation report. That is as to Count I.

15 Then as to Count II, \$2,216,737.02 to be paid to
16 Nova Information Systems, and this restitution amount
17 joint and several with Cory Johnson. I'm going to
18 waive interest on the restitution obligation.

19 Finally, there'll be no fine, but there is a
20 special assessment of \$400 that you will be required to
21 pay.

22 Now, I believe the plea agreement in this case
23 did waive the right to appeal if the sentence was
24 within or below the guideline range; is that correct?

25 MR. WEST: That's correct.

1 MR. REICH: Yes, your Honor.

2 THE COURT: Since the sentence here is within
3 the guideline range after the departure, the appeal
4 waiver is in effect.

5 Is there anything else that we need to cover?

6 MR. REICH: No, your Honor.

7 MR. WEST: May I have a moment?

8 THE COURT: Yes.

9 (Pause.)

10 MR. WEST: Your Honor, I don't know how long it
11 will take until a designation is made in this matter
12 and I do know Mr. Whitaker would like to take care of
13 certain legal matters in the Commonwealth of
14 Massachusetts. I don't know if the Court can encourage
15 the marshals' office to facilitate that. I do know
16 he's desirous of being able to attend to those legal
17 matters. I note that for seeking your input.

18 THE COURT: What kind of legal matters are you
19 talking about?

20 MR. WEST: He has a detainer, I believe, he has
21 to clear up, a probation matter.

22 THE COURT: Well, what needs to be done?

23 MR. WEST: He needs to go there, basically. Be
24 allowed to go there if it can be arranged through his
25 counsel. His counsel in Massachusetts is present in

1 the courtroom and did request that I seek, to the
2 extent the Court is willing to do so, that the marshals
3 cooperate in that regard.

4 THE COURT: Well, why don't you come up.

5 (Side bar conference off the record.)

6 THE COURT: All right. We'll be in recess.

7 (Court concluded at 10:05 a.m.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, certify that the foregoing is a true and correct copy of the transcript originally filed with the clerk on May 23, 2012, and incorporating redaction of side bar conference requested by the following attorney of record: George West, in accordance with the Judicial Conference policy. Redacted characters appear as a black box in the transcript.

/s/ Anne M. Clayton

Anne M. Clayton, RPR

May 23, 2012

Date